IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10937 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KISHORBHAI RAMSINGBHAI VAGHELA

Versus

COMMISSIONER OF POLICE

Appearance:

MR YOGESH S LAKHANI for Petitioner

MR SP DAVE AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 23/04/2001

ORAL JUDGEMENT

1. The petitioner abovenamed has preferred this petition under Article 226 of the Constitution of India challenging the order of his detention passed by the Commissioner of Police, Rajkot - respondent no. 1 herein

on 13.9.2000 on the ground that the petitioner was found to be bootlegger and therefore, he was required to be detained in exercise of the powers conferred by Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short "PASA").

2. The petitioner has challenged the aforesaid order of his detention dated 13/9/2000 on various grounds. The Detaining Authority has stated in page 15 that it was not possible to go as per the provisions of Section 57 of the Bombay Police Act and therefore, it was necessary to detain him and therefore, order of detention has been passed. The petitioner has challenged the order of detention on the ground that the Detaining Authority has considered the ground, which was not applicable in the case and at the same time, the Detaining Authority has not considered the provision of law which was available to him in the facts and circumstances of the case and therefore, the order of detention suffers from non application of mind. It is therefore, prayed that in view of above position, the detention order is illegal and therefore, it is required to be quashed and set aside.

3. On the aforesaid contention, the petitioner has claimed that the order of detention may be treated to be illegal and consequently, the order of detention passed against him be quashed and set aside and the petitioner may be set at liberty forthwith.

4. On receiving the petition, Rule was issued and Mr. S.P. Dave, learned AGP appears on behalf of the respondents and waived service of Rule. I have heard Mr. Y.S. Lakhani, learned advocate for the petitioner and Mr. S. P. Dave, learned AGP for Respondents.

5. The learned advocate has taken me through the grounds of detention made available to the petitioner by the Detaining Authority. It would be relevant to consider para - 5 of the grounds of detention at page no. 15. It shows that the Detaining Authority has taken into account a fact that the petitioner was a bootlegger but it was not possible for the authority concerned to have action against him under Section 57(C) of the Bombay Police Act, 1957. The reason given is that for the purpose of taking action against the petitioner in accordance with Section 57(c) of the said Act, it was necessary to have at least two offences registered against the petitioner. That in the present case, only one offence was registered against the petitioner and

therefore, it was not possible for the authority concerned to take action against the petitioner under Section 57(c) of the said Act and therefore, it was found that the petitioner was required to be detained in exercise of the powers conferred by Section 3(2) of the PASA Act.

6. It has been argued at length that the provision, which is not applicable to the petitioner has been taken into consideration. At the same time, the provision made in Section 56 of the Bombay Police Act, 1957, can be attracted and that has not been taken into account. It is well settled that when the less drastic remedy is available, it would not be proper to go for more drastic remedy. It is to be seen that it is not the case of the respondent that the provision made in Section 56 of the said Act would not attracted and the remedy made available in that provision of law would not apply to the facts before us.

7. This clearly means that the Detaining Authority has considered the remedy available to him u/s. 57(C) of the Bombay Police Act and has stated that since the petitioner has only one offence registered against him, it was not possible to go ahead with that provision. In other words, the detaining authority has considered a remedy which was not legally available to him. At the same time, the detaining authority has not at all considered the provision made in Section 56 of the said Act. This shows that the remedy available to the detaining authority was omitted from consideration and the remedy not available was considered. The requirement is that he detaining authority should be aware of less drastic remedy, available to him and that he had considered the same before issuing detention order. Non consideration to the less drastic remedy available to him would lead us to infer that there was non application of mind with respect to the availability of less drastic remedy. Such a non application of mind would further lead us to held that the impugned detention order is illegal.

8. In support of the said arguments, learned advocate for the petitioner has placed reliance on the decision of one JAYANTI NENUMEL RAMNANI VS. COMMISSIONER OF POLICE, reported in 2000(2) GLH 166. Para 7 of the said decision may be reproduced for ready reference as follows :-

" Taking into consideration rival side contentions, the first aspect that attracts the

attention of this Court is the defect in considering the alternative less drastic remedy. In the grounds of detention, the authority has stated that resorting into the proceedings under Section 57(C) is considered by it, but, for that purpose at least two convictions are necessary for resorting to that remedy. Whereas in the instant case there is only one case registered against the petitioner which is pending investigation and, therefore, it is not possible to resort to Section 57(C) of the Bombay Police Act. The Detaining Authority, in affidavit-in-reply at para 11 states as under :-

"With regard to ground (H) of the petitioner I say that long procedure under Section 59(1) of the Bombay Police Act, 1951 is common for action both Section 56 and 57 of the Act. The grounds discuss why the long procedure will not serve the purpose of public interest and hence immediately remedy under PASA is resorted to."

It is crystal clear that the grounds for not taking action against the petitioner under Section 57(C) which are considered while passing the order of detention, are not the grounds which are stated in the affidavit-in-reply. In the grounds of detention, the ground of Section 57(C) of the Bombay Police Act was considered as not possible to be resorted for the reason that the two convictions are required for taking action against the petitioner under the said provision. In the affidavit-in-reply, the Detaining Authority comes with a different version, namely that the same was not resorted to because the proceedings under Section 59 (1) of the Bombay Police Act are lengthy. Thus, the grounds stated in the affidavit-in-reply for not resorting to less drastic remedy under Section 57(C) did not find place in the grounds of detention."

9. Therefore, it has been made clear that the aforesaid provisions were again available in that case also and the said provision was not taken into consideration. Therefore, it was found that the less drastic remedy was not taken into consideration by the Detaining Authority and therefore, the order of detention was found to be illegal.

10. It seems that the principle enunciated in the aforesaid decision, squarely applies to the facts of the

case before us. In above view of the matter, I respectfully follow the decision arrived by this Court in the aforesaid case and consequently, it is required to be said that the order of detention is illegal and required to be set aside.

11. In that view of the matter, the order passed by the respondent no. 1, detaining the petitioner as aforesaid, cannot be sustained in the eye of law.

12. For the reasons stated above, the petition is required to be allowed and the order of detention against the petitioner is required to be set aside. In view of above, other points have not been pressed into services.

13. For the fore going reasons, this petition is allowed. The impugned order dated 13/9/2000 passed by the Commissioner of Police, Rajkot city is quashed and set aside. The detenu shall be released forthwith if not required in any other case. Rule is made absolute accordingly. Direct Service Permitted.

(D.P. Buch, J.)

pallav